



REPUBLIC OF KENYA

High Court at Meru

Civil Suit 163 of 1996

RUBINA ABDUL MAJID..... PLAINTIFF

VERSUS

JULIUS MARETE T/A NTONYIRI BUS SERVICE.....DEFENDANT/APPLICANT

R U L I N G

The Application before court is a Notice of Motion dated 2nd August, 2012. It has been brought under the provision of Order 17 Rule 2(3) and, Order 51 Rule 1 and 3 of Civil Procedure Act and all enabling provisions of the law.

The Applicant seeks the following orders:-

- 1. That this honourable court be pleased to dismiss the suit herein for want of prosecution.**
- 1. That this honourable court do award costs of this application and those of the entire suit to the defendant.**

The application is premised on nine (5) grounds which are:

- 1. That this suit was scheduled for hearing on 17th May, 2010 but the same did not proceed.**
- 2. That since then, the plaintiff has not set down the suit for hearing.**
- 3. That there has been inordinate and inexcusable delay in prosecuting the matter and justice can no longer be served.**
- 4. That the plaintiff/respondent is not at all interested in the prosecution of his suit.**
- 5. That litigation must come to an end.**

The application is supported by an affidavit sworn by Steven Muregi Chege, Advocate for the Applicant. The affidavit gives a chorology of the case. I have considered its contents.

This application was served upon the plaintiff's advocate Nyaga Kamunde and Company Advocates on the 2nd August 2012. The notice served upon the said advocate contained the date set for the hearing of this application. Despite service the plaintiff has not filed any Replying Affidavit or any papers in

response to the application.

In brief this suit was filed in court on the 31st October, 1996 by the advocates for the plaintiff, who are still the ones on record for the plaintiff. There were two defendants at time of filing suit. The defendants were served with the summons to enter appearance and the plaint. The defendant herein filed the memorandum of appearance and defence on 11th July 2000. An ex-parte judgment was entered against the defendant who did not enter defence. on the 7th January 1997 the exparte judgment was set aside and the case ordered to go for full hearing.

The record shows that the case was set for hearing on the 17th May, 2010 but the same did not proceed. No other dates have been fixed for the hearing of this case. It has been more than 2 years to date.

The conditions which must be proved before a suit is dismissed were discussed in the celebrated case of **Ivita v Kyumbu 1984 (KLR) 441, Chesoni J**, whereas he then was held:

“A defendant who has waived or acquiesced in delay is not entitled to a dismissal of the action for want of prosecution but mere inaction on the part of such defendant does not amount to a waiver or acquiescence.

The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court”.

I am persuaded by this authority. There has been inordinate delay in setting this suit down for hearing. That delay has not been explained because the plaintiff did not file a response to this application. I do find that the plaintiff has lost interest in the matter and that would explain his failure to respond to the application and in the overall delay in the hearing and disposal of this suit.

I find that the application has merit.

Accordingly I do allow prayer 1 of the application dated 2nd August 2012 and dismiss this suit for want of prosecution with costs of the suit and of the application to the defendant/applicant.

DATED SIGNED AND DELIVERED THIS 1ST DAY OF NOVEMBER 2012

LESIIT, J

JUDGE.